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Office of Secretary

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August 22, 1996

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via messenger

William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554-0001

Re: **CC Docket 92-297**--Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services

Dear Mr. Caton:

Enclosed please find the Reply Comments of the Attorneys General of Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Massachusetts, Minnesota, Missouri, New York, Oklahoma, Pennsylvania, Rhode Island, Virginia, Washington, West Virginia and Wisconsin, submitted for filing in the above-captioned proceeding. An original and nine copies of these Reply Comments are attached to this letter. Please date-stamp one of the copies and return it to the messenger.

Thank you for your assistance.

Very truly yours,

Emily B. Myers

Emily B. Myers
Counsel for Antitrust and Health

Enclosures

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AUG 22 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Rulemaking to Amend Parts 1, 2, 21 and 25)
of the Commission's Rules to Redesignate the)
27.5-29.5 GHz Frequency Band, to Reallocate the)
29.5-30.0 GHz Frequency Band, to Establish Rules)
and Policies for Local Multipoint Distribution)
Service and for Fixed Satellite Services)

CC Docket No. 92-297

**REPLY COMMENTS OF THE ATTORNEYS GENERAL OF CONNECTICUT,
DELAWARE, FLORIDA, IDAHO, ILLINOIS, IOWA, MASSACHUSETTS,
MINNESOTA, MISSOURI, NEW YORK, OKLAHOMA, PENNSYLVANIA, RHODE
ISLAND, VIRGINIA, WASHINGTON, WEST VIRGINIA AND WISCONSIN**

The Attorneys General of Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Massachusetts, Minnesota, Missouri, New York, Oklahoma, Pennsylvania, Rhode Island, Virginia, Washington, West Virginia and Wisconsin ("Attorneys General") file these Reply Comments in response to the Federal Communications Commission's ("Commission") First Report and Order and Fourth Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding issued on July 22, 1996. In this Notice, the Commission, among other things, seeks comments on the eligibility of incumbent local exchange carriers ("LECs") and cable operators to obtain local multipoint distribution service ("LMDS") licenses in the geographic areas they already serve.

I. INTRODUCTION

The Attorneys General, as chief law officers of their states, are the primary enforcers of the states' antitrust laws and also represent their states and the citizens of their states in federal antitrust

litigation. As chief legal officers, the Attorneys General have had, and continue to have, an important role in the development of national competition policy.

The Attorneys General strongly support the introduction of real, effective competition, as contemplated by the Telecommunications Act of 1996 ("Act"), in the telecommunications industry. Competition will bring consumers more and better choices in telecommunications services at lower prices. By protecting and encouraging competition, the antitrust laws promote efficiency, low prices, better management and greater consumer choice.

In particular, the Attorneys General support the development of bidding and eligibility rules for LMDS licenses that will prohibit the LECs and cable operators from bidding for new LMDS franchises in geographic markets they already serve until there is effective competition in these markets.

II. THE COMMISSION SHOULD ADOPT BIDDING AND ELIGIBILITY REQUIREMENTS FOR LMDS LICENSES THAT WILL PROMOTE ENTRY BY NEW COMPETITORS

In enacting the pro-competitive and deregulatory mandates of the Act, Congress clearly intended for the Commission to develop rules and regulations for existing local exchange competition that would promote and facilitate local competitive entry. Congress also manifested its intent that the local telephone monopolies should not be able to enter in-region, interLATA exchange markets until there was real facilities-based local exchange competition. Similarly, the Act seeks to promote real competition in the multichannel video-programming market. As a wireless, broadband competitive alternative to both local telephone and video services, LMDS offers an

excellent way to promote this facilities-based local exchange and multichannel video-programming competition that Congress believed was vital to the future of telecommunications.

The Attorneys General strongly believe that the best way to ensure real competition in the immediate future is for the Commission to develop rules that will guarantee that there will be the greatest possible number of competitors in each local market.¹ The Commission can only ensure this prospect, however, if it prohibits the LECs and cable operators from bidding for new LMDS franchises in their existing local geographic service markets. Otherwise, the best the Commission can hope for is two competitors in whichever market (cable or local telephone service) the winning monopolist seeks to enter, with a continuing, entrenched monopolist in the other service market.

If the incumbent LECS and cable operators are not precluded from bidding for LMDS licenses in their own geographic service markets, these entities may be all too willing to pay or bid premium prices to discourage any other potential purchaser and assure themselves of future monopoly profits. Unfortunately, our experience with antitrust enforcement in other industries leads us to believe that this outcome is all too likely.

For example, the Pennsylvania Attorney General made this precise allegation several years ago in its lawsuit to challenge the proposed acquisition of Financial News Network, Inc. ("FNN") by its only competitor, Consumer News and Business Channel Partnership ("CNBC"), a subsidiary of General Electric Co. In that case, CNBC increased its initial pre-bankruptcy offer of \$105 million twice, after a competing bidder entered the picture, eventually agreeing to pay \$154.3 million for

¹The Commission should also consider adopting rules that will prohibit the incumbent LECs and cable operators from evading these safeguards through subsequent mergers by requiring divestiture of the LMDS license if a merger results in the combined entity possessing such a license in any of its local market areas.

FNN's assets. The premium price offered by CNBC coupled with the deteriorating assets of FNN, caused the new bidder to withdraw, leaving CNBC as the winner by default.

In its Fourth Notice of Proposed Rulemaking, the Commission asked, among other things, whether there is "an economic incentive for an incumbent to bid successfully at auction and to warehouse the spectrum . . . [o]r divert it to less competitive uses." The Attorneys General can speak directly to this point.

As previously noted in the May 10, 1996, ex parte letter submitted by the Attorneys General of Pennsylvania, Minnesota, and Wisconsin, 40 state Attorneys General filed antitrust complaints and settlement agreements in federal court in New York in June 1993 to resolve their claims against seven of the largest cable operators in the country and Primestar Partners, L.P., a joint venture of the defendant cable operators and GE Americom Communications, Inc., a subsidiary of the General Electric Co. These filings culminated a five-year investigation by the states that paralleled a similar investigation by the United States Department of Justice into anticompetitive practices in the cable television industry.

The Primestar case involved a new, potentially competitive service to cable television -- high-powered Direct Broadcast Satellite Service ("DBS"). This new service would allow consumers to receive multichannel subscription television programming by using a comparatively small home satellite dish in contrast to the oversized dishes that were then in common use.

At the time the lawsuits were brought, the seven major cable companies named as defendants provided service to nearly half of the nation's cable subscribers, virtually all of them operating in areas without a direct competitor. High-powered DBS, therefore, posed a serious challenge to the

cable operators' local monopolies, since a single DBS operator would be capable of reaching all consumers and competing directly with every cable operator.

As noted previously in the ex parte letter, the complaints charged the defendant cable operators with stifling competition from their non-cable competitors, such as satellite TV operators, by denying or restricting their competitors' access to multichannel subscription television programming. The complaints also alleged that in order to suppress the developing DBS technology, the defendants formed the Primestar Partners joint venture for the purpose of acquiring control of the only DBS satellite then available, preempting its use by a non-cable competitor, and agreeing to offer programming that would not compete with programming already offered by the defendant cable operators. The joint venture agreement also granted each cable operator partner the exclusive right to distribute the DBS service in its cable franchise area, eliminating competition between the joint venturers as sellers of the DBS service.

The settlement negotiated by the states ensured that satellite broadcasters, microwave-relay television systems and others that have sought to compete against the cable industry will be able to buy programming owned or controlled by the cable industry on "reasonable terms." The cable companies also agreed that they would not discriminate against a company offering a competing technology.²

Like DBS in the early 1990s, LMDS is a new technology that will have the capacity to be a direct, facilities-based competitor to the existing LEC and cable monopolists. Without the

²The United States Department of Justice announced at the same time a separate but similar agreement with the same parties.

safeguards suggested, however, the Attorneys General believe that this new form of direct competition to the existing LECs and cable monopolists will be lost.

Finally, the Commission also seeks comments on whether there would be "other realistic means of entry" by the would-be new entrants if the LMDS spectrum was purchased by the incumbent LECs or cable operators. Although potential entrants are in the best position to respond to this question, our experience in merger cases indicates that future spectrum allocations would not be a good substitute for bidding restrictions for at least two reasons.

First, we understand that any new spectrum offering is probably at least several years away. Antitrust analysis emphasizes that entry by potential competitors must be "timely" to be effective. The significant time delay would make it extremely difficult, if not impossible, for any new competitor to enter effectively the LMDS market, because the monopolist will be even more entrenched with a "head start" over the would-be competition. Second, there is no guarantee that the LECs and cable operators would not simply acquire the new spectrum as well. In order to minimize the restrictions on free competition, the incumbent monopolists should be precluded from bidding during the first round of bidding in order to open up immediately these markets to real competition. Full, effective competition now would eliminate the need for such preclusionary rules in the future.

III. CONCLUSION

The Telecommunications Act of 1996's primary goal is to promote a pro-competitive telecommunications industry. With or without this new LMDS technology, there is no doubt that the LECs and cable operators have the capability and resources to offer telephone and multichannel video programming in both new markets and markets they already serve. By promulgating bidding

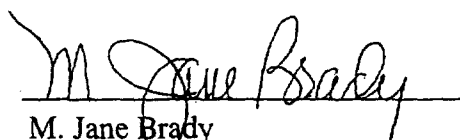
and eligibility rules for LMDS licenses that will prohibit the LECs and cable monopolists from bidding for new LMDS licenses in their existing local service areas, the Commission will ensure that this new broadband, wireless service will provide effective competition to the incumbent monopolists by guaranteeing that there will be at least one additional competitor in every local market in the country.

Dated: August 22, 1996

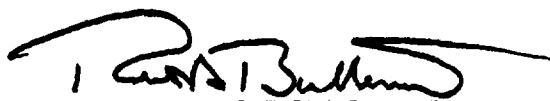
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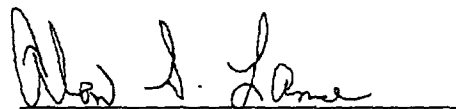
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Attorney General of Connecticut



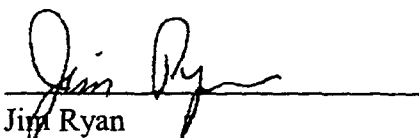
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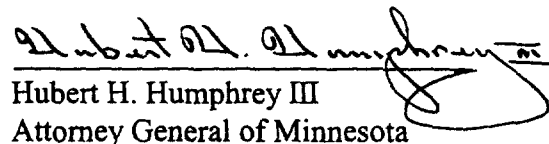
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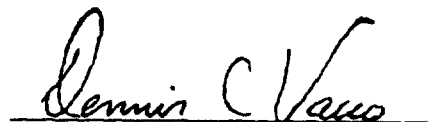
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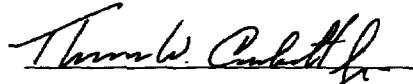
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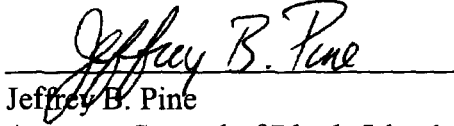
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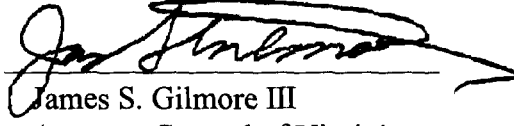
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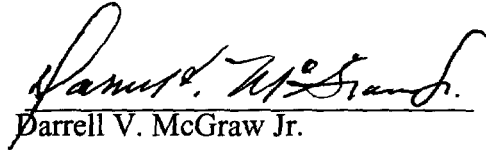
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